APPENDIX 4

CLAIM NO: CO/2959/2015

IN THE HGH COURT OF JUSTICE
ADMINISTRATIVE COURT

BETWEEN

DAVID PAUL DOYLE

Claimant

- and –

LONDON BOROUGH OF SOUTHWARK

Defendant

SUMMARY GROUNDS OF RESISTANCE

INTRODUCTION AND SUMMARY

1. This claim is without any merit and further (applying the amendments to s.31 the Supreme Court Act 1981[1]) it is plainly *"highly likely that there is no likelihood of a substantially different outcome for the Claimant*". This application for permission therefore falls to be refused.

2. This is a challenge by a resident to the expansion of Keyworth primary school (the "School"). The Claimant's home backs onto an under-used area of managed "habitat" land within the School's boundary (see plan attached as Appendix 1 indicating the relevant areas). The School proposes to double in size to meet an overwhelming, urgent local need, and to do so by (in part): developing this under-used habitat land and other areas to become classrooms; re-designing its existing playing areas; and creating new playing areas. These primary school places are urgently required for next September (2016), i.e. 12 months' time, for children in the borough who need a primary school place next year. There will be a shortfall without this school expansion, and the Defendant Council (the "Council") will be in breach of statutory duty if this expansion does not take place. For these acute reasons the Council also seeks expedition, see paragraph 50 below.

Workshops

3. The Claimant's primary and first ground of challenge is that the Council failed to consider the "alternative" option of expanding into an adjacent, tenanted area (the "Workshops") and leaving the "habitat" land untouched. There are three core points as to why this ground is misconceived:
   1) It is trite planning law that alternatives are not usually a material planning consideration. This is for self-evident reasons; either a proposed development is acceptable on a particular piece of land on its own terms, or it is not. The existence of another piece of land for a similar use or operational development is not usually relevant. Planning law is quite clear that alternatives "*may*" only be a material consideration in narrow or exceptional circumstances and whether they are or not in any particular case "*will depend upon the precise circumstance of the case, as*

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[1] by s.84 of the Criminal Justice and Courts Act 2015

assessed by the local planning authority", see ***R (Langley Park School) v Bromley LBC*** [2009] EWCA Civ 734 .

2) The "alternative site" that the Claimant asserts has not been considered:
   (1) Importantly, is not available and there is no prospect it will be available until some point after April 2018, and if possession was contested possibly some time beyond 2020-2022;
   (2) Has been expressly considered and was rejected in 2008 (by the school), and in March 2015, after consideration of the alternative urged by the Claimant, by the full Cabinet of the Council; that decision was not challenged;
   (3) Is not a proposal supported by the school; and
   (4) In any event, the Council has alternative long-established plans to bring the "alternative" Workshop site forward for a residential or mixed-used scheme to help meet the acute shortage of housing in Southwark, which is a major priority for the Council.

   It is in the Council's case that in these circumstances caselaw (and common sense) firmly establishes that it is not an alternative which the Council is required to take into account.

3) The Claimant's argument against this accepted legal background is that precise circumstances exist to require assessment of the Claimant's inchoate alternative because:
   (i) Policy 3.3 in the Local Plan, which is a sustainability policy essentially requiring social, economic and environmental impacts to be assessed, also requires a sustainability assessment to expressly assess this particular alternative of the Claimant's. The Council's response is that quite plainly Policy 3.3 does not require this;
   (ii) Proper consideration of whether or not the habitat site alone was a "brownfield" site would have led the Council to have preferred the development of the Workshops over the loss of the habitat space. The Council's response is that the habitat site is quite plainly a brownfield site, further it is plainly part of a brownfield planning unit, and further that in any event, given all the factors in this case, this would quite plainly make no difference at all;
   (iii) The proper application of an entirely separate statutory regime under the Education Acts, whose conditions have been fully complied with, requires this alternative to be assessed in the planning system. The Council's case is that it does not.

4. None of these points are sufficient to outweigh the usual position that it is for an applicant to apply for planning permission and for that application to be assessed on its own terms. Neither are they sufficient to require the Council to consider the Workshops site as an alternative. There is also no realistic prospect that this Workshop site could sensibly be considered an alternative for expansion of this primary school in 2016.

"Playing fields"

5. The Claimant's second ground of challenge is an alleged breach of s.77 of the Schools Standards and Framework Act 1998. This is misconceived. It relies on selective quotation from the documents. There has been no net loss of "playing field" land, but rather a net gain, and a substantial qualitative improvement. All of the statutory procedures have been complied with. Further any suggestion that the Secretary of State has erred in law in approving this consent is also out of time and the Council is entitled to rely on the consent as confirmed by the Secretary of State.

6. For all these reasons permission should be refused.

B. CHRONOLOGY AND RELEVANT FACTUAL BACKGROUND

7. The following chronology is likely to be helpful to the Court:

2008	First proposals for development of the Workshops[2] discussed as part of a wider redevelopment. The Primary School opted out of the scheme **(p.286).**
2009	Council begins delivery of extra primary school reception places. 1,080 places are created between 2009 and 2013 to meet growing need.
2011	Keyworth Primary School begins to accept "bulge" classes to meet the need in its area.
2012	The Independent Housing Commission chaired by Jan Luba QC reports. This leads to a major community conversation on the future of council housing, the largest engagement exercise ever undertaken by a Council in relation to housing, and included over 80 different key events.
2012	Keyworth Primary School expands permanently by 0.5 of a class to meet the growing need for primary school places. This expansion is managed by use of a portacabin which is granted temporary planning consent and the staff vacate their staffroom for a much smaller room so that the staffroom can be used as classroom. Pressure on other school facilities, such as dining rooms and playground, increases.
June 2012	Consideration given to Keyworth Primary School's site and expansion possibilities where it is recognised that the site is large enough to support a 3 form entry, *"a new multistorey building would need to be constructed"* and a 3 form entry was not required at that time.
2013	London Plan sets out that London's population will continue to be younger than elsewhere in England and Wales and that by 2031 its school age population will increase by almost 17%.
July 2013	The Council's housing strategy is reported to Cabinet, *"Independent Housing Commission– Conclusions and Next Steps Following Community and Stakeholder Engagement*". Cabinet resolve to set the Council an ambitious target to build 11,000 new homes itself by 2043 and a senior officer group crossing all relevant Council Departments is created.
July 2013	Council agrees its Primary Investment Strategy, noting the forecast demands for primary places and associated need to create additional capacity within Southwark's primary estate. This scheme will by 2015 involve a capital commitment of £106.5million to meet a total of 2,631 additional primary school places across the borough by September 2016.

[2] The "Workshops" are variously described in the documents as the "Kennington Workshops" and the "Braganza Workshops" as they are accessed from Braganza Street.

22 Oct 2013	Workshop Site identified in Cabinet report ("Direct Housing Delivery – Phase 2") as a possible future site through joint partnership arrangements in the future.
Jan 2014	Council adopts "*Vision for a new housing strategy for Southwark*", includes that it "*will use every tool at our disposal to increase the supply of all kinds of homes across Southwark*".
Jan 2014	Further updates to the Council's Primary Investment Strategy.
March 2014	As primary school needs continue to rise, Keyworth Primary School is one of two schools identified in the north of the Borough "*with strong potential for creating new primary places*".
June - July 2014	Hawkins/Brown have numerous client meetings as to the expansion of Keyworth Primary School.
July 2014	Leader of the Council states: "*London is suffering from a chronic shortage of quality, affordable homes. We in Southwark are committed to using every tool at our disposal to increase the supply of all kinds of homes across the borough, including new council homes... Through our planning policies, we will unlock new sites for house building, both council and commercial*".
22 July 2014	The School Places Strategy Update is agreed by Cabinet.
Jan 2015-Feb 2015	Council consults on this particular expansion of Keyworth Primary in accordance with the relevant regulations. Claimant responds to consultation.
10 March 2015	Target under the London Plan raised from 2,005 net new homes a year to **2,736** net new homes annually. This is a very challenging target.
17 March 2015	Officer's Report to Cabinet notes that "*demand for primary school places, particularly in the north of the borough, continues to rise. This report brings forward plans for further additional primary places from 2016 as previously planned in a number of primary places strategies seen by cabinet over the last two years*". **One of the points which arose in the consultation and which was expressly summarised in the Officer's Report was that "*The Council has not considered Councillor Neil Coyle's advice to consider using the Kennington Enterprise sit to expand the school, an avenue which would allow a sustainable development to take place*" (page 269). This was considered in the Officers' Report which explained that** **"All suggestions at the time of planning were assessed and considered in the light of available land, project phasing and delivery of the curriculum. The one adopted offered the best combination of all three" (page 270).** Cabinet expressly approves further primary school expansions at 6 specific primary schools, including this school.
28 April 2015	The Planning Officers Report considered a number of issues in relation to this application, including the reasons why the Workshop site were not considered as an alternative: ***"A suggestion that the adjoining enterprise building could be incorporated as part of the development would not be possible as the building is currently in use, it does not belong to the school and the demand for school places is immediate."(page 97)***
7 May 2015	Grant of planning permission.
20 May 2015	Claimant sends Pre Action Protocol letter.
9 June 2015	Council replies to PAP letter including extensive attachments.
15 June 2015	Claimant requests further documents urgently.
15 June 2015	Council sends requested documents by return.
17 June	Claimant files proceedings in the High Court.

2015	
23 June 2015	High Court seals proceedings.
24 June 2015	Claimant sends notification of claim to the Council, but only the N461 form, under cover of a letter which states that "the *bundle follows by post*".
29 June 2015	Council receives bundle in post which does not contain grounds of claim, and urgently seeks these from the Claimant.
29 June 2015	Claimant provides grounds of claim.

8. Three key points emerge from the chronology above:

(1) There are pressing, indeed overwhelming, needs within the London Borough of Southwark (and London generally) for primary school places. The Mayor's 2020 programme predicts that 4,000 new classes are needed in London by 2020. The NPPF attaches great importance to meeting this need. This growing need for substantially expanded primary school places has been clear to the Council for many years. 1,080 extra primary school places were created in Southwark between 2009 - 2013 (and this school has admitted above its approved admission numbers since 2011 to meet this need) but demand continues to rise, outstripping supply.

(2) There is an acute need for homes in the London Borough of Southwark (and indeed London generally). The target under the London Plan for Southwark has just been raised yet again to 2,736 net new homes annually. The London Borough of Southwark has carried out an unprecedented consultation exercise and as a result is bringing forward a major innovative housebuilding project of its own which requires major investment to deliver 11, 000 homes. These schemes have been the subject of numerous reports to full Cabinet. It is inconceivable that this "*overwhelming need for housing in the Borough*" would not have been known to all Members of the Committee.

(3) Plans for the expansion of this school site within its own boundaries, and the reasons why the Workshops were not available, were the subject of consideration by full Cabinet on 17 March 2015 following the statutory consultation. As noted above the issue was raised in the report to Cabinet. In addition a member of the public, Geraldine Vomero, asked Cllr Williams (Cabinet member for Regeneration, Planning and Transport) a specific question at the meeting regarding the use of the Workshops site. Cabinet heard the discussion and resolved to agree the expansion of the School. The minutes of the meeting were published on the Council's website. In so far as the Claimant asserts that it has "*consistently sought to persuade the Council that it should consider the expansion of the School on the Workshops Site in preference to the proposed development*", the proper time to have challenged the Council's decisions as landowner as to how to meet the variety of needs in its area from its resources was in March 2015. There was no challenge to that decision.

Relevant factual background matters: the Workshops

9. The Workshops have 19 units, which are multi-tenanted with individual separate leases to individual occupiers of a multi-use space. Some of the leases continue until 2017. The Council has been in negotiations with different tenants for many years and the Council cannot secure vacant possession as of right of the whole site until April 2018 at the earliest (when the current longest lease expires). Further, not all the leases have excluded the Landlord and Tenant Act 1954 ("LTA 1954")[3] and should proceedings become contested there is little possibility that vacant possession would be achieved much before 2020[4], and indeed significantly longer (many years) if they were strongly contested and particularly if any order refusing a new lease was appealed.

10. Further, and irrespective of LTA 1954 proceedings, the Council would not usually move quickly to litigation to secure re-possession of the properties of valued local businesses and charities, particularly when in any event there is as yet no proposed scheme. Some of those occupying this site have been in occupation for a long time and play an important role in the local community. The Council treats its tenants with respect and where appropriate is keen to preserve employment uses within the borough[5]. As the Council informed the Claimant in its response to his FoI request (to which the Claimant fails to draw the Court's attention in his grounds of claim):

> *"The Council have historically given a commitment to the business tenants that they would assist tenants to relocate to alternative locations upon redevelopment. Any redevelopment is some way off and therefore alternative locations have not been identified. Current thinking would see some re provision of the business space on the current site in the event of redevelopment".*

The Council would also be mindful of its public sector equalities duties given the important role local charities play from this site, for example in providing support for disabled people in Southwark. The Council would also wish to retain occupancy levels at this site until a scheme has come forward, in order to maintain an income stream in a time of austerity and to deter squatters. The Council has thus consulted the tenants and others as proposals to redevelop this site continue. There are all important matters in relation to the redevelopment of this site which will require careful balancing of a variety of considerations. These reasons are a significant part of why this site has not yet come forward for redevelopment despite a number of consultations.

11. Lastly, the Workshops have existed for many years and the precise nature of all uses in that time is unknown. There is a strong possibility that at least some of the Workshop land is contaminated.

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[3] The Council wrongly informed the Claimant that this was not the case.

[4] Proceedings under the LTA 1954 cannot start until the final year of a tenancy. Once the process of issuing the Notices has taken place and proceedings are lodged, they may take between 9 – 24 months; regional courts are at the lower end, and London cases, usually heard in the very busy Central London County Court, at the higher end. Even if an order is obtained, and the Council would need to show the proposal was deliverable, the tenancy still continues for 3 months and 14 days. Any appeal could take another 20-24 months. The order refusing a new lease does not itself entitle a landlord to possession so possession proceedings would be required if a tenant did not then leave.

[5] From a planning perspective, the principle of a change from employment to any alternative use is assessed under Southwark Plan Saved Policy 1.4. This is an employment site outside the preferred locations expressly preserved within Saved Policy 1.4 and therefore alternative uses can be considered for this site. Any proposal by the Council for the redevelopment of the site would therefore be assessed taking into account all planning policies and relevant material considerations, which could include (if appropriate at that time) that there was a shortage of sites such as this in the borough.

12. The Claimant has been repeatedly informed that there are impediments but has been highly selective in the quotations in the grounds of claim[6]. The Claimant is thus wrong to assert that "*the Workshops Site is available to the Council in short timescales...*". It follows that there is no realistic prospect that the Council will have possession of this site in time for new pupils to use the site in September 2016, or indeed at any time before 2018 at the earliest. This alone is a complete answer to this claim and why permission should also be refused applying s.84 of the Criminal Justice and Courts Act 2015.

"Interim measures"

13. The Claimant is also entirely wrong to assert that the *"immediate need is for a single form of entry in 2016 which can be accommodated through interim measures even if the construction is delayed"*. The Acting Headteacher has been consulted and is clear that that the only interim measure that would be available is one or two temporary classrooms (i.e. a portacabin) and that such a measure is unworkable and unacceptable, and she could not support it educationally for the clear, cogent and persuasive reasons she gives in her statement. Further, she also makes clear that onward delay of many years whilst waiting for the Workshop site would be absolutely unacceptable, causing massive detriment.

The Habitat space

14. The Claimant's grounds are indirectly in part based on an assumption that the habitat space is of some considerable value and that it would be worth avoiding its loss by expanding into the Workshop area, whereas in fact it is an under-used, undervalued part of the school site, and the School welcomes the opportunity presented by this scheme to improve its outdoor space. See in particular the Acting Headteacher's statement, which reflects the earlier comments in the Design and Access Statement, the Planning Officer's Report, and the Acting Headteacher's explanation to the Planning Committee.[7]

[6] The Claimant does not quote either the response to his FoI request which sets out some of the complexities of the multi-tenanted nature of the site and stated clearly that "*vacant possession of the site could not be achieved in the time frame required, due to lease obligations and the time needed to relocate current occupiers*" *or the* Council's clear email of 16 June in response to the Claimant's direct request for further information about the leases that "*the Council cannot see that there is any possibility of the site being available... in September 2016*". In commercial lease terms, where the average lease is around 10 years, the possibility of vacant possession by 2018 is indeed a short period. Nevertheless this does not enable delivery of an expanded primary school by September 2016.

[7] And also as was set out in (1) the Design and Access Report, 2014 that they are "*not an efficient use of the site, and create a disjointed playspace that is difficult to supervise*"; *and* the Planning Officers' report that the "*existing woodland area and landscaped garden do not provide functional play space and create a disjointed arrangement that is difficult to supervise. The proposal looks to link the outdoor spaces across the site, both visually and physically, to create a varied yet coherent environment for children to learn and play*" ***(p.99)*** and as the Acting Headteacher herself explained to the Planning Committee that *"its very difficult for the school to manage they have to take grounds of children to that space because its about safeguarding and not being able to stand back"* **(p.157).**

C. ADDITIONAL RELEVANT LEGISLATIVE FRAMEWORK UNDER THE EDUCATION ACTS AND PLANNING POLICY FRAMEWORK

Legislative framework

15. The Council is under a statutory duty to deliver education places under s.14 of the Education Act 1996. The Education Act 2011 removed the power for local authorities to establish new community schools to address the issue of increased demand for primary places. The only way the Council can meet their statutory duty is to expand existing provision or look to free schools or academies to meet demand.

16. Furthermore when proposing school alteration proposals, the regulations (currently the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2012) require the Secretary of State's statutory guidance to be given specific consideration[8]. These provide time-frames for publication of the required statutory notices when a prescribed alteration is proposed and for a decision to be made within a short period following consultation. One of the factors in that guidance is that decision-makers *"should be satisfied that any land... required to implement the proposal will be available...A proposal cannot be approved conditionally upon funding being made available".* The report to Cabinet noted in specific response to this requirement that:

> "The enlargements will all take place on existing school sites. Funding is considered in the financial paragraphs below, but it should be noted that appropriate land, premises, and the capital required to implement the proposal have been identified, are available, and that all relevant local parties (eg trustees) have already given their agreement" **(p.268).**

Planning policy framework

17. The need for primary school places is of very substantial weight. The NPPF attaches *"great importance"* to the need for a choice of school places and provides that local authorities should give *"great weight to the need to create, expand or alter schools"* and Southwark's Core Strategy 4 and the Southwark Plan Saved Policy 2.3 (Enhancement of educational establishments) and Policy 2.4 (Educational deficiency – provision of new educational establishments) encourage new and enhanced educational facilities.

18. It is difficult to conceive of planning considerations which will outweigh this substantial need; they would in principle need to be of very great weight. The only application for increased places (in this case a free school) that this Council as local planning authority has refused was subsequently called-in by the Mayor. The Council had resolved to refuse the Southwark Free School application on seven grounds – the Keyworth School scheme was not recommended for refusal on any ground, indeed there was no substantial harm identified and what harm was identified is adequately mitigated. The Southwark Free School scheme had been the subject of major substantial concerns raised by the Southwark Design Review Panel and many detailed objections were received. In granting planning permission, the Mayor placed substantial weight on the *"established significant*

[8] *School Organisation – Maintained Schools; Guidance for proposers and decision-makers* and Annex B, *Guidance for decision makers,* January 2014

need for primary schools in the borough and in this area in particular" and "*the clear demand for other educational facilities.*"

D. THE CLAIMANT'S GROUNDS OF CHALLENGE

19. Against this stark background, the Claimant brings two grounds of challenge:
    (1) Failure to consider Alternatives;
    (2) Breach of section 77 of the School Standards and Framework Act 1998.

Ground 1: Failure to consider alternatives

20. The Claimant asserts that the Committee was *"misdirected"* by being repeatedly told that it was *"not open to them to consider alternative solutions"* because, the Claimant asserts, *"the Committee should have been directed to make a judgment as to what weight to accord to the availability of the alternative solution"*. The Claimant asserts that "*this was a clear misdirection"*.

21. As a starting point, this is wrong. There is no clear misdirection. The starting position in planning law is that there is no need to consider alternatives. The case-law is clear that, as a matter of principle, there is always a very real consideration as to whether or not there is a need to consider alternatives before any question of weight begins, see ***R. (Mount Cook Land Ltd) v Westminster City Council*** [2004] 2 P. & C. R. 405.

22. ***Mount Cook*** was a case where an objector to a grant of planning permission had design options setting out alternative proposals, but had not himself made any planning application. The local authority considered that those proposals were too vague for consideration but summarised the proposals in the officer's report to committee, advising that they were irrelevant to the consideration of the applicant's scheme. This decision was upheld by the Court of Appeal (per Auld LJ) which adopted the following provisions of law:

    > *1) in the context of planning control, a person may do what he wants with his land provided his use of it is acceptable in planning terms;*
    > *2) there may be a number of alternative uses from which he could choose, each of which would be acceptable in planning terms;*
    > *3) whether any proposed use is acceptable in planning terms depends on whether it would cause planning harm judged according to relevant planning policies where there are any;*
    > *4) in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant in planning terms;*
    > *5) where, as Mr. Corner submitted is the case here, an application proposal does not conflict with policy, otherwise involves no planning harm and, as it happens, includes some enhancement, any alternative proposals would normally be irrelevant;*
    > *6) even, in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight.*

23. Auld LJ further held that

    > *"...Even in an exceptional case, for such alternative proposals to be a candidate for consideration as a "material consideration", there had to be at least a likelihood or real possibility of them eventuating in the foreseeable future if the application were to be refused. When approaching the matter as one of likelihood or real possibility, it might often be difficult to distinguish between materiality and weight, both of which were essentially matters of planning judgment. However, a court, when considering the rationality in a judicial review sense of a planning decision, ought not to be shy in an appropriate case of concluding that it would have been irrational of a decision-maker to have had regard to an alternative proposal as a material consideration or to have given it any or any sufficient weight so as to defeat the application proposal.*

24. A need may only begin to emerge and become a material planning consideration if there are clear planning objections to development upon a particular site, which could be met by development on a more appropriate alternative site elsewhere, and the need to even begin to consider them will increase the more significant the adverse effects (per Scott Baker L.J. in ***South Cambridgeshire District Council v SSCLG*** *[2009] P.T.S.R. 37,* considering Simon Brown J (as he then was) in ***Trusthouse Forte Hotels Ltd v SSE*** *(1986) 53 P. & C. R. 293*). These cases were subsequently considered by Sullivan LJ in ***R. (Langley Park School) v Bromley London Borough Council*** [2010] 1 P. & C. R. 10, where he held that the less the injury that is caused by an application proposal, the less likely is the need to consider whether the injury might be reduced by a revised siting of proposed new buildings, and where there are no clear objections to a proposal development, alternative proposals, whether for an alternative site or a different siting within the same site, will normally be irrelevant. The sliding scale means that in many – indeed most – cases an alternative is not even a material consideration. Sullivan LJ accepted a similar list to Auld LJ. Whilst emphasising that it was not intended to be exhaustive, he held that the following factors were

> *""likely to have a bearing on the issue of whether alternative [schemes] are relevant in a given case:*
> *i. the nature and degree of the harm arising from the proposal;*
> *ii. the nature and urgency of the need;*
> *iii. the scope for alternatives which could sensibly satisfy the need;*
> *iv. the extent to which the feasibility of such alternatives has been demonstrated (ie the weight which can be attached to them)."*

25. Sullivan LJ held that alternatives "*may*" only be a material consideration in narrow or exceptional circumstances and whether they are or not in any particular case "*will depend upon the precise circumstance of the case, as assessed by the local planning authority*".

26. Carnwath LJ (as was) developed this line of authority further in ***Derbyshire Dales DC v SSCLG*** [2010] 1 P. & C.R. 19 where he rejected a challenge that a planning inspector had erred in law in deciding that he did not need to consider alternative sites for a proposed wind farm development. He concluded that the consideration of alternative sites was unnecessary both as a matter of law and on the merits of the proposal. Carnwath LJ concluded that, short of irrationality, the question of whether something even amounts to a "material consideration" in any particular case is one of statutory construction, i.e. it is necessary to show that the matter was one which the relevant statute expressly or impliedly requires to be taken into account "*as a matter of legal obligation*". Carnwath L.J. concluded that there was nothing in the statute or in the relevant policies before that Inspector which required the Inspector to consider alternatives, especially because (in that case) none had been identified. As he observed, the emphasis of s.78 of the 1990 Act is on the particular application in question. The statutory provisions and policies relating to the national park required special regard to be paid to their protection, but they fell short of imposing a positive obligation to consider alternatives that might not have the same effects. That was left as a matter of planning judgment on the facts. This was how the inspector had approached it, and he had been entitled to do so.

27. The Claimant therefore faces a high hurdle in this case. He makes little real attempt to confront the major difficulties as to why his view of an inchoate alternative, which is not the subject of any

application for planning permission or design, should be specifically assessed in this case. This case is remarkably similar to that in ***Mount Cook,*** save that the Council does not even have sketchy drawings of the Claimant's proposed alternative scheme.

28. The Council emphasises the following points in concluding in this case that there was no obligation on the Council, as a matter of planning law, to consider the alternative urged on them by the Claimant:
    (1) Importantly, regardless of whether there was any other application or scheme, the alternative Workshop Site is not available and there is no prospect it would be available in time to meet the need for further provision by September 2016, which is acute. That there is no realistic feasibility of the Claimant's alternative scheme coming forward is one of the factors the Court of Appeal in ***Langley Homes*** also placed weight on; it is "*unlikely*" with "*no real possibility of coming about*".
    (2) There is in any event no other application for planning permission before the Council. The Court of Appeal in ***Mount Cook*** has made clear that "*even in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight*". That is this case here.
    (3) In any event, any application for planning permission or even outline scheme of some sort for use of the alternative site would also need to recognise the complexities around the existing employment use of the Workshop site, see paragraph 10 above;
    (4) Further, any application for planning permission or even outline scheme of some sort would also need to recognise the competing pressures on the Council's limited resources. The reality is that, if the School was to be able to expand into some or all of the Workshop site in time (which it plainly cannot), the under-used habitat land and/or the land occupied by the nursery school would be likely to come forward for housing. This would be consistent with the pre-war planning history of this site and enable the terraced line to continue, albeit that given the scale of the current needs a scheme of greater density would be likely. Clearly there is no such scheme currently before the Council but, if there were, it is likely it would have similar traffic and amenity impacts as the use of the habitat land by the school for extra classrooms. Thus, there are no possible clear planning objections to the current scheme;
    (5) The Council is under a statutory duty to deliver these places under s.14 of the Education Act 1996 and the acute and urgent need and time-frame for delivery is well known, and these are material considerations to take into account when considering whether or not the Council is in the circumstances of this case impliedly required to consider the Claimant's inchoate alternative;
    (6) The reality is that this proposal for the expansion of the School is clearly in accordance with the development plan. The planning impacts of this expansion on the Claimant are in planning terms clearly capable of mitigation (which was extensively discussed at the Committee Meeting and has also been conditioned). Further the impacts are not such that

there would be any prospect whatsoever of such impacts outweighing the overwhelming need for expansion. The existence of the alternative is undeliverable in time and irrelevant.

29. Against this powerful case as to why this alternative was not one that required any assessment (and in fact was given a suitable degree of assessment: see the planning officer's report set out in the chronology), the Claimant asserts that alternatives were required to be assessed in the particular circumstances of this case for three poor reasons.

Reason 1: Policy 3.3. of the 2007 Southwark Plan

30. The Claimant asserts that Policy 3.3 of the 2007 Southwark Plan was somehow an "*express policy requirement to consider alternatives"* which also requires a specific alternative to be assessed (see paragraph 37(a) of the grounds of claim). He also complains that "*Members were not advised as to the failure of the applicant to provide a sustainability assessment, nor of the need for such an assessment to demonstrate that the most sustainable option had been identified".* This is wrong for the following reasons.

31. First, Policy 3.3 is a policy requiring a sustainable assessment in order to assess the economic, environmental and sustainability impacts of the proposal. It is only the reasons for the policy which state that these impacts are to be "*assessed and balanced to find the most sustainable option for the development",* not the policy itself. The proper interpretation of Policy 3.3 simply requires assessment of these factors so that the most sustainable option for the development within its envelope is found, pushing developers to maximise the social, environmental and economic opportunities available by requiring their consideration. There is no suggestion in the Policy text, its reasons, or the underlying Sustainability Assessment Supplementary Planning Document that this necessarily requires alternatives outside a site boundary to have been assessed. What is required by this policy, as the accompany guidance makes clear, is that there is a sustainability appraisal so that it can be assessed whether a particular application maximises in so far as it can in accordance with policy the social, environmental and economic impacts. Very clear terms would be required for it to be "read into" a policy such as this that an applicant was required to carry out a wide ranging assessment of any other site any individual might choose to raise outside the red line of a proposal in order to demonstrate sustainability, and such an approach finds no support in the NPPF or the general principles of planning law as set out in ***Mount Cook.*** It is not a policy even close to equivalent to the "*very special circumstances*" required for inappropriate development in the Greenbelt, which is what sits behind the review of alternatives in Greenbelt cases, and to which LJ Sullivan referred in ***Langley Park*** which itself concerned Metropolitan Open Land.

32. Second, as to the Claimant's further complaint that no sustainability assessment was required as it should have been, and that if it had been this would have shown that expansion on to the Workshop site was more sustainable. There are three limbs to the response:

32.1 This argument is wholly misconceived. Even if a formal document entitled a "sustainability assessment" had been provided, it was not required to assess the Claimant's preferred Workshop Alternative. If as a matter of its discretion the Council decided to do so, this would plainly show that there are a large number of competing considerations around the delivery of some future wider scheme across both the School's site and the Workshop site. Given the planning constraints in the area and the historic use of the habitat site, the likely result (if possession of the Workshop site could be obtained) would obviously be an alternative housing scheme bringing forward the old line of the terraces but at a greater density that existed in the pre-war era, and would cause similar traffic and amenity impacts of which the Claimant complained. It would in any event be a fruitless exercise, because the Workshop site is not available in time for the acute primary school need.

32.2. In so far as Policy 3.3 was not cited by the Officers, this was plainly remedied by the Claimant, who expressly drew it to the Committee's attention. The Claimant's transcript records that the Claimant expressly quoted to the Committee that

> *"environmental, social and economic impacts are assessed through a sustainability assessment... and balanced to find the most sustainable **option** for the development". This was not carried out. Regardless of misclassification the adopted SPD checklist must be followed requiring as a minimum that "the proposal is on brownfield land and Policy 3.3. demands alternative site analysis".*

The Committee therefore had this point before them and took into account in reaching their decision that there was not a specific sustainability assessment, but that nevertheless officers had assessed the economic, social, and environmental aspects as is required under the NPPF and planning policy and considered that the proposal was sustainable. The Committee nevertheless resolved to grant planning permission. Members clearly carefully considered all the aspects of this scheme and plainly had before them all the necessary information to take into account the overall sustainability of the proposal.

32.3 In so far as there is any technical failure in not having formally required a "sustainability appraisal" with the application, this is not accepted and in any event does not make any material difference. The policy itself states that "*The level of detail required in the Sustainability Assessment should correspond to the scale and complexity of the development*". All of the relevant information was before the Council. The Council considers that a document labelled a "Sustainability Assessment" would not be a proportionate request in all cases. Policy 3.3 dates from 2007 and whilst it has been "saved" it is interpreted in line with the NPPF and the 2011 Core Strategy in particular SP1 – Sustainable Development, which were referred to at the Committee Meeting and discussed in the Officer's Report. The major applications validation checklist was updated in 2013 and the automatic requirement to provide a Sustainability Assessment was removed. Government policy was for Local Planning Authorities to simplify their validation requirements and to make proportionate requests (see for example "*Guidance of Information Requests and Validation*", March 2010, now withdrawn by the publication of the NPPF). The Council does not consider it could reasonably refuse to validate an application

simply on the basis that Policy 3.3 required production of a document labelled a Sustainability Assessment. Officers judge on a case-by-case basis whether a specific Sustainability Assessment is required in accordance with Policy 3.3, SP1, and the NPPF. The Council assessed environmental, social and economic impacts in accordance with policy and determined that the application was sustainable. This is the usual approach by other authorities where there is no specific need for a document labelled a Sustainability Assessment provided the information is available in other documents[9].

33. Given these factors Policy 3.3. simply does not amount to special or particular circumstances such as to require assessment of an alternative site in this case.

Reason 2: Brownfield site

34. The Claimant in its grounds asserted that the Committee was misdirected through being advised that the habitat land was previously developed land as it had been built on in the past. This point is both wrong, and irrelevant.

35. The habitat land was undoubtedly previously developed land in the usual meaning of this term, i.e. land which had previously been developed. Officers correctly advised Members as to the planning history of this particular area as having originally been a continuation of residential terraces further to the south but that these had been bombed during the war. The Claimant's argument depends on the amended definition of brownfield land in the NPPF. This provides that brownfield land excludes "*land in built-up areas such as private residential gardens, parks, recreation grounds and allotments; and land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time".* The definition within the NPPF was amended to meet a particular planning purpose, namely to restrict (i) the phenomena of "garden grabbing" for residential development which was a major problem in many areas and (ii) to protect the redevelopment of larger areas of land for example around former waterworks which had ceased to be used for this purpose, but had had become significant areas of open space in their own right.

36. The point is wrong for three reasons:
    (1) The starting point when assessing an application for planning permission is the red line of the application, which will usually be the same as the planning unit. In this case, there is no doubt that the whole of this site is the land which has been occupied by the primary school and used by the school for educational uses. It is the site as a whole which falls to be assessed. That whole is clearly brownfield land.
    (2) The Claimant asserts that the habitat land is akin to a "recreation ground". It is not. It is an under-used area of land managed by the school for educational purposes. It is not used for play-space or recreation (see paragraph 14 above and the Headteacher's statement).

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[9] This is also illustrated the Mayor's decision on the Southwark Free School where policy 3.3.is cited, but no specific Sustainability Assessment was submitted, but all the relevant information was clearly before the Council and the Mayor and it was the subject of specific assessment within the report (as was the case here).

(3) The Claimant alternatively asserts that it is land that was previously developed but that the remains of the previous structures "*have blended into the landscape in the process of time*". Clearly the remains of the former terraces that were bombed in the war have been removed, but the habitat site has not "*blended into the landscape*". The landscape setting is that of the urban grain of an inner city area. This habitat site is plainly part of an inner city primary school, but the site has not "*blended into*" a park-scape or rural landscape in the passage of time.

37. The point is also irrelevant, because its relevancy depends on the Claimant's assertion that if the Claimant was right (which he is not) then "*members should have been directed that this was not previously developed land and that accordingly there was a policy presumption against its development and in favour of sites (such as the Workshops Site) which are previously developed land. They then could have assessed what weight to give to the alternative of developing the Workshops Site.....".* As is set out above, no weight can sensibly be given to the Workshop Site, which is not available to the Council and will not be available at any time soon. In any event there is in planning terms no possibility that the history of the actual use made of the small area of this habitat site would be a material consideration in the planning judgment exercised over the expansion of this School, and whether the habitat site should be redeveloped or not, given its low level of use to the School.

38. Given these factors this alleged error simply does not amount to special or particular circumstances such as to require assessment of an alternative site in this case.

Reason 3: The School Standards and Framework Act 1998

39. Lastly, the Claimant asserts that the Council was "*subject to a statutory duty not to take any action intended or likely to result in the change of use of a playing field".* This is wrong and, in any event, irrelevant to the Claimant's alternative considerations argument. It is wrong because the statutory duty the Council was subject to under s.77(7) of the School Standards and Framework Act 1998 is not to dispose or change the use of any playing fields save with the consent of the Secretary of State. The Council has obtained the consent and therefore there is no possible breach of statutory duty. It is well-established that the planning system is not usually concerned with the compliance of other statutory regimes[10]. This ground of challenge is hopeless.

40. It is also irrelevant because, as a matter of its planning judgment, which is what this Committee was charged with, it is plain that the Committee were well aware that what was being proposed was a re-design of the school areas and that some of the playing areas would be affected. The overall changes and benefits of the changes in playing space were also considered in the Officers' Report and by the Committee, with the clear conclusion that they were beneficial. The Claimant's transcript also includes express discussion of, inter alia, the play-space available and the proposed redesign,

[10] Indeed, the material planning policies which act to protect playing fields as defined under the Town and Country Planning (Development Management Procedure) (England) Order 2010 were expressly noted, and that they do not apply.

including as to the amounts of play-space and whether a planting area would be retained. All of these matters were taken into account in their planning judgment.

41. This factor is not capable of being a special particular circumstance such as to require a particular alternative to be assessed.

Ground 2 – s.77(3) of School Standards and Framework Act 1998

42. This ground of challenge is wholly without merit and permission should be refused, for two reasons.

43. First, as to its substantive merits. It is entirely based on an alleged "*loss of playing fields in excess of 1,000m2*", and the Claimant thus asserts that the condition required for the Secretary of State's consent that there be "*no net loss*" is not met.

44. This is wrong. The documents which accompanied the application to the Secretary of State detail the relevant calculations (see **p.262,** and the breakdown by reference to a diagram on **p.263** which clearly shows how the calculation has been obtained and makes reference to the new 30m2 first floor terrace and sets out in red that there is a *"NET INCREASE OF 1m2 OF PLAYING FIELD AREA*" at the end of the calculations (emphasis in original)). The Claimant entirely fails to draw the Court's attention to these documents despite having expressly sought them from the Council. The Claimant inexplicably bases his analysis on other documents which are not designed to address this point. The Claimant also fails to reference the substantial, qualitative improvement in the quality of the play-space which is provided in the new scheme. The Acting Headteacher explains that "*the proposals will be a massive improvement on our current facilities".* The Council is not in breach of its statutory obligations.

45. Second, in any event, the Claimant is not able in these proceedings to challenge the consent given by the Secretary of State. That consent remains valid unless quashed and the Council is entitled to rely on it. Further, the appropriate Defendant to any such claim would be the Secretary of State and/or the Education Funding Agency. Any such challenge is also out of time as the consent was granted on 11 March 2015. It would also be wholly unmeritorious for the reasons as set out in paragraph above in that there is no error in the consent. For the avoidance of any doubt, the Council has recalculated these measurements and confirms that the submission to the Secretary of State is correct.

46. The Claimant does not in its claim form seek to challenge such a consent, makes no application to extend time in relation to challenging any such consent, and simply refers in passing in paragraph 13 to the relevant grant of consent not having been provided sooner. It is no good reason that the Claimant, acting through experienced solicitors from an early time, asked about alternative sites pursuant to section 77 of the School Standards and Framework Act 1998 on 17 April, to which the Council replied to on 27 April, addressing the point raised, and yet now seeks to challenge the terms of that consent. It is self-evident from any understanding of the Act that there would have been an application for consent, as indeed the Claimant's solicitor's pre-action protocol letter referred to (for

the first time). The Claimant was promptly informed of the grant of this consent on 9 June, which would have been in time to challenge it, but did not even seek the terms of such consent until nearly a week after that date, by which point time had expired.

47. Lastly, the Claimant is also wrong to state that "*the Council accepts in its pre-action reply that the proposals do consist of a change of use of playing fields*". This is both a misleading and in any event erroneous. It is misleading because, as the Council's pre-action reply makes clear, the Claimant (but not the Council) has frequently confused the substantially different definitions of playing fields within the Town and Country Planning Act to the definition under an entirely different statutory framework which has its own statutory processes (both of which the Council considered and complied with). It is erroneous because the Council has made no such concession. The Council's use of the term "playing space" simply encompasses the changes taking place within the planning unit and reflects that officers and Members were aware of those changes. The Council has not accepted that the habitat land is necessarily a "playing field" within the terms of the School Standards and Framework Act 1998 as it is not used as a playing field or for recreation, but there is no need to determine this point in this case because there is no net loss of the relevant land, even if the habitat land is included. The point is thus entirely academic.

E. OTHER MATTERS

Out of time

48. It is currently unclear to the Council whether this claim has been properly lodged in accordance with the rules. CPR 54.5(5) requires a claim form challenging a planning decision to be lodged within six weeks of the date of the consent and CPR 54.6(1) and (2) requires the claim form to set out the required matters and be accompanied by specified documents, which Practice Direction 54A requires to include the grounds of claim. It appears that the claim was filed on 17 June 2015 but for some reason was not sealed by the court until 23 June 2015. When the claim bundle was finally served on the Council on 29 June 2015 (and it was required to be served within 7 days of the date of issue) it did not include the grounds of claim. It is not clear to the Council that the claim when first filed contained those grounds of claim. The Council's position is therefore reserved. Given the urgency of the subject of this claim, and its lack of merit, the Council considers there would be no good reason to extend time if it were out of time.

Consideration under s.31 of the Supreme Court Act 1981 as amended by s.84 of the Criminal Justice and Court Act 2015

49. The Court is required to give consideration when requested by a Defendant as to whether it is "*highly likely that the outcome for the applicant would not have been substantially different*" and if so, the "*court must refuse to grant leave*". This provision is clearly met in this case (see paragraph 52 below).

Urgent need and expedition

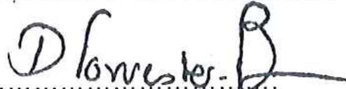
50. The Council seeks expedition of this claim which is of great importance to the hundred or so pupils who will apply to this school in January 2016 for admission. The Council recognises that obtaining such expedition cannot be guaranteed against the variety of urgent business this Court considers, particularly given the summer vacation. Yet the Council as Education Authority is under a statutory duty to deliver school places. The Court is thus urged to determine this current application for permission as expeditiously as possible. The Education Authority is currently moving swiftly forward with the necessary applications to discharge the relevant conditions and it would be the Council's preference to commence works during this summer vacation if possible, which commences on 21 July 2015, subject to discharge of the necessary conditions. This would minimise disruption to the pupils, but construction from late October will still enable delivery by September 2016.

51. The Claimant was informed in its PAP response that because of the Council's overriding need to comply with its statutory obligations and ensure that pupils have a place to be educated next September, the Council would take every step it can to ensure that it will meet its statutory obligation. The Education Authority is therefore currently preparing a further application for planning permission, without prejudice to the Council's clear view that this claim is wholly misconceived and there is no obligation to have considered this inchoate alternative and that there has been no error of law.

52. Whilst clearly every planning application must be determined on its merits (as this one will be), as the Officer's Report concluded in relation to this application, this application is in accordance with the development plan and the relevant planning impacts (including on the Claimant) can be mitigated. They are not undue impacts and the other planning and deliverability constraints within the area will continue to exist. The Claimant's proposed alternative site is simply not available and there is no possibility of it being available for delivery by September 2016. There is therefore no likelihood of a substantially different outcome for the Claimant, for the reasons as set out above. A positive grant of this subsequent application will render this application academic; nevertheless, the Court is urged to determine the permission application to enable the swift conclusion of these proceedings, so that works can begin as soon as possible to minimise the disruption to pupils.

53. For all these reasons, permission to bring this claim should be refused. The Council also seeks its costs of this Acknowledgment of Service.

I believe that the facts stated in these Summary Grounds of Resistance are true.



Doreen Forrester-Brown

Director of Legal Services, London Borough of Southwark

20 July 2015

SASHA BLACKMORE

LANDMARK CHAMBERS

CLAIM NO: CO/2959/2015

IN THE HGH COURT OF JUSTICE
ADMINISTRATIVE COURT

BETWEEN

DAVID PAUL DOYLE

Claimant

- and –

LONDON BOROUGH OF SOUTHWARK

Defendant

APPENDIX 1 TO SUMMARY GROUNDS OF RESISTANCE

Keyworth Primary School

Aerial View

Hawkins\Brown